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11 **IN THE UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 Kirby Spencer,

14 Plaintiff,

15 v.

16 Kohl's Department Stores, Inc.,

17 Defendant.

Case No. 2:14-CV-01646-RFB-CWH

**PLAINTIFF'S MOTION FOR
LEAVE TO FILE AN AMENDED
COMPLAINT AND
INCORPORATED
MEMORANDUM OF POINTS
AND AUTHORITIES**

Hon. Richard F. Boulware, II

Magistrate Judge Carl W. Hoffman

18
19 COMES NOW, Plaintiff KIRBY SPENCER, by and through his undersigned
20 counsel, and files this *Motion for Leave to File an Amended Complaint*.
21

22 Dated: February 5th, 2015

Respectfully submitted,

CRAIG K. PERRY & ASSOCIATES

By: /s/ Craig K. Perry, Esq. _____

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Kirby Spencer (“Plaintiff”) respectfully moves, pursuant to Fed. R. Civ. P.
3 15, for entry of an Order granting him leave to file an Amended Complaint, attached hereto
4 as Exhibit A. The proposed First Amended Complaint adds class allegations, as Plaintiff
5 seeks to go forward with this matter as a class action in which he represents a putative class
6 of individuals who were sent unauthorized automated “robocalls” by Defendant. In support
7 of this Motion, Plaintiff states as follows:

8 **BACKGROUND**

9 On October 7, 2014, after receiving numerous unauthorized robocalls from Defendant
10 Kohl’s Department Stores, Inc. (“Defendant” or “Kohl’s”), Plaintiff initiated this lawsuit
11 under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* The robocalls were
12 all sent from three phone numbers, (414) 257-2399, (262) 704-9780, and (903) 593-8790, all
13 of which are associated with Defendant, a nationwide retailer with customers across the
14 country. Under almost the exact same circumstances as Plaintiff’s, countless consumers have
15 complained of receiving unauthorized automated phone calls from Defendant through the
16 above numbers in an attempt to collect on a delinquent account even though they have never
17 contacted Defendant, opened an account with Defendant, or given Defendant permission to
18 place such calls. Below is just a small sample of complaints listed online which show that
19 Defendant’s conduct of repeatedly placing unauthorized automated calls to individuals who
20 have no relationship with Defendant is widespread, causes much frustration, and is an
21 ongoing issue:

22 “Multiple calls a day, no voicemail left and when I do answer, no one is on the other
23 end. If this is Kohl’s, I do not have a Kohl’s account whatsoever!” (Dean,
24 10/6/2014.)

25 “I’ve had several calls from this number. They never leave a message. I have never
26 ever shopped with Kohls, but a lot of other people say this is from Kohls trying to
27 collect debt. I can’t imagine why they are calling.” (Susan, 6/25/2014.)

28 “If it is Kohls [I’ve] never even been in a Kohls!” (Jcg, 6/4/2014.)

“I get calls from this number several times a[] day. I understand that it's Kohls but I

1 don't have an account with them so why are they calling??" (Patricia, 3/17/2014.)

2 Based on Plaintiff's investigation to date, including information relating to the mass
3 transmission of automated calls from a specific set of phone numbers; the number of
4 informal complaints asserted against Defendant's automated calling operation; the ongoing
5 nature of Defendant's conduct; and Defendant's admission in its recent Motion to Stay
6 Action that, indeed, it had been sending misdirected automated calls to Plaintiff without his
7 consent and that such calls were the result of Defendant's widespread systematic practices
8 (*see* Dkt. 10 at 1-2), Plaintiff would now like to move forward with this case as a class
9 action, on behalf of all individuals who have received similar such unauthorized automated
10 phone calls from Defendant.

11 LEGAL STANDARD

12 Pursuant to Rule 15 of the Federal Rules of Civil Procedure, leave to amend
13 pleadings "shall be freely given when justice so requires." *DCD Programs, Ltd. v. Leighton*,
14 833 F.2d 183, 186 (9th Cir. 1987) (amendments to pleadings pursuant to Rule 15 "should be
15 applied with extreme liberality") (internal quotations omitted). Motions to amend under Rule
16 15 should be granted unless there is evidence of undue prejudice to the opposing party;
17 undue delay, bad faith, or dilatory motive on the part of the movant; or if the proposed
18 amendment is futile. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051–52
19 (9th Cir. 2003); *Siller v. Aloya*, No. 14-cv-1810-GPC-MDD, 2015 WL 222470, at *2–3 (S.D.
20 Cal. Jan. 14, 2015); *Fradella v. City of Henderson*, 2:09-CV-0680-LRH-PAL, 2011 WL
21 2183066, at *1 (D. Nev. June 3, 2011).

22 While the consideration of prejudice is the factor that carries the greatest weight, *see*
23 *Eminence Capital*, 316 F.3d at 1052, the party opposing amendment "bears the burden of
24 showing prejudice." *DCD Programs*, 833 F.2d at 187. "Absent prejudice, or a strong
25 showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a)
26 in favor of granting leave to amend." *See Eminence Capital*, 316 F.3d at 1052 (emphasis in
27 original). In this case, none of the aforementioned factors are present at all, much less
28 sufficiently to overcome the presumption that this amendment should be freely granted,

1 particularly at this very early stage of the litigation.

2 ARGUMENT

3 The proposed Amended Complaint adds allegations relating to the maintenance of
4 this case as a class action and clarifies Plaintiff's theory of the case, but does not otherwise
5 materially alter the underlying claims from the original Complaint. The maintenance of this
6 suit as a class action will not require new substantive "theories" or any additional expert
7 testimony as, for example, Defendant's use of an automatic telephone dialing system to send
8 the phone calls will be established in the same way for Plaintiff individually as it would be
9 for the putative class as a whole. As a result, the proposed Amended Complaint cannot be
10 said to prejudice Defendant in any way, especially when the addition of class allegations
11 would only require limited additional discovery at a time when the Court only recently set a
12 discovery schedule with a discovery cutoff of July 28, 2015, when the deadline to amend
13 pleadings is April 29, 2015 (Dkt. 19), and when no discovery has even yet been issued. *See*
14 *Legg v. E-Z Rent A Car, Inc.*, No. 14-cv-1124-WQH-BGS, 2014 WL 4805206 (S.D. Cal.
15 Sept. 26, 2014) (granting motion for leave to amend the complaint to alter class allegations
16 and noting a lack of prejudice to the defendant) (citing *Eminence Capital*, 316 F.3d at 1052).

17 While amending the Complaint to add class allegations would result in Plaintiff
18 filing a motion for class certification at the appropriate time in this case, Defendant would be
19 no more prejudiced than if this case had been initially filed as a class action. Likewise, the
20 amendment would not be futile, since Plaintiff is confident in his ability to certify the class
21 and should have the opportunity to satisfy his burden in a formal class certification motion at
22 a later time. Of course, Defendant remains free to oppose class certification but should do so
23 at the appropriate time in opposition to the motion for class certification. *See U.S. Bank Nat.*
24 *Ass'n v. Friedrichs*, No. 12-cv-2373-GPC-KSC, 2013 WL 6686327, at *4 (S.D. Cal. Dec. 17,
25 2013) (granting leave to amend and stating that the court would defer any challenges to the
26 merits of the proposed amended complaint until after leave to amend is granted); *Legg*, 2014
27 WL 4805206, at *2 (same). In short, any class-related discovery would be relatively modest,
28 and the addition of class allegations at this stage in the case would not be futile and would

1 not prejudice Defendant any more than if this case was originally filed as a class action.

2 Additionally Plaintiff seeks leave to amend the Complaint in good faith and not for
3 any improper purpose, comports the factual and legal allegations to the evidence obtained
4 through investigation to date, including Plaintiff's investigation into the telephone numbers
5 from which the telephone calls were sent, and the facts admitted by Defendant in its recent
6 Motion to Stay Action. In its recent Motion to Stay, which was denied by this Court on
7 January 28, 2015 (Dkt. 18), Defendant stated as follows:

8 Kohl's records confirm that in July 2013, the 3075 Number [Plaintiff's cell phone
9 number] was provided to Kohl's by a [sic] one of its customers as the contact number
10 associated with a Kohl's private label credit card account, held by an individual with
11 a name different from Plaintiff's. . . . In accordance with the terms of the
12 Cardmember Agreement, Kohl's places non-telemarketing, account-related calls to its
Kohl's private label credit card customers, including to remind customers when they
have an overdue credit card balance.

* * *

13 Here, the challenged calls are all the result of this accepted arrangement, except that
14 the calls placed to Plaintiff's number were intended for another person. . . . Kohl's
15 records reflect that in or about June, 2014, the Kohl's credit card account associated
with the 3075 Number became delinquent, and that Kohl's placed calls to the 3075
Number to inform its customer of the overdue balance.

16 (Dkt 10 at 1–2.) Defendant's Motion to Stay both confirms Plaintiff's allegations, as well as
17 supports the informal complaints of other called parties across the nation, in that Defendant
18 has a widespread practice of placing misdirected automated phone calls to individuals that
19 have never had any relationship with Defendant. Based on Defendant's actual conduct, as
20 well as the nature of Defendant's conduct and its mistaken belief that it is allowed to place
21 automated calls to the cellular telephones of individuals that have never consented to receive
22 such calls, Plaintiff now seeks to amend in good faith to add a prayer for injunctive relief and
23 to represent all individuals who, like him, have received and continue to receive unauthorized
24 automated calls from Defendant.

25 Further, Plaintiff did not unduly delay his instant request for leave to amend, seeking
26 leave to amend just days after entry of the January 29, 2015 discovery Order, which sets a
27 discovery deadline of July 28, 2015 and a deadline to amend pleadings of April 29, 2015.

1 (Dkt. 19.) Additionally, plaintiff seeks leave to amend prior to the propounding of any
2 discovery in this case and prior to the scheduling of any depositions.

3 WHEREFORE, Plaintiff Kirby Spencer respectfully requests that this Court enter an
4 Order granting his Motion for Leave and permitting Plaintiff to file his First Amended Class
5 Action Complaint.

6 Dated: February 5th, 2015

Respectfully submitted,

7 CRAIG K. PERRY & ASSOCIATES

8 By: /s/ Craig K. Perry, Esq

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17 *Counsel for Plaintiff Kirby Spencer*
18 *and the Putative Class*
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CERTIFICATE OF SERVICE

I hereby certify that on February 5th, 2015, I electronically filed the forgoing *Plaintiff's Motion for Leave to File an Amended Complaint and Incorporated Memorandum of Points and Authorities* with the Clerk of the Court using the CM/ECF system. Notice of this filing is sent to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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Dated: February 5th, 2015

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